Supreme Court, U.S.
FILED
95-2091 JUN 27 '96
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

OKLAHOMA COUNTY BOARD OF COUNTY COMMISSIONERS,
and
J.D. SHARP, INDIVIDUALLY AND AS SHERIFF OF OKLAHOMA COUNTY, et al.,

Petitioners-Defendants,

vs.

SUZANNE MYERS, et al.,

Respondents-Plaintiffs.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

PATRICK J. MORGAN, OBA #6400
First Assistant District Attorney
JOHN M. JACOBSEN, OBA #11879
Counsel of Record
Assistant District Attorney
Attorneys for Petitioners
505 County Office Building
Oklahoma City, Oklahoma 73102
(405) 278-1600

June 26, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

68 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Tenth Circuit erred in determining it lacked jurisdiction to review the United States District Court for the Western District of Oklahoma's denial of qualified immunity for the individually named defendants in action brought pursuant to 42 U.S.C. Section 1983?

LIST OF PARTIES

The Caption contains all of the parties to the proceedings before the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Statutes and Constitutional Provisions 1

Statement of the Case 2

Reasons for Granting the Writ 4

Conclusion 7

TABLE OF AUTHORITIES

Page

CASES CITED:

-SUPREME COURT-

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) 6

Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834 (1996) 5, 6, 7

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 4, 5, 6

Johnson v. Jones, 515 U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) 3, 4, 6, 7

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985) 6

Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855 (1978) 5

-OTHER AUTHORITIES-

28 U.S.C. 1254 1

28 U.S.C. 1291 4

42 U.S.C. 1983 ..... 2, 3

PETITION FOR WRIT OF CERTIORARI

Petitioners J.D. Sharp, Scott Cannon and Marshall McDonald, in their individual capacities, pray that this Court issue a Writ of Certiorari to review the propriety of the judgment of the United States Court of Appeals for the Tenth Circuit, filed on May 10, 1996, which dismissed for lack of jurisdiction Petitioners' appeal of the United States District Court for the Western District of Oklahoma's denial of qualified immunity.

OPINIONS BELOW

The slip opinions of the Tenth Circuit and the District Court are contained in Petitioners' Appendix to this Writ of Certiorari.

JURISDICTION

The judgment of the Tenth Circuit was entered on April 1, 1996, and filed on May 10, 1996. Motion for Rehearing was not filed. This Court has jurisdiction under 28 U.S.C. Section 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS

The issues arise within the context of 12 U.S.C. Section 1254 in determining the Tenth Circuit's jurisdiction to entertain the individual Petitioners' appeals of the District Court's denial of summary judgment on the issue

of qualified immunity in the context of an action brought pursuant to 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

On or about February 18, 1994, Respondents initiated a civil rights lawsuit in the United States District Court for the Western District of Oklahoma (the "District Court") against Sheriff J.D. Sharp, the Oklahoma County Board of County Commissioners ("Oklahoma County"), and Sheriff's Deputies Scott Cannon and Marshall McDonald. This lawsuit was based on the shooting death of Thomas Myers ("Decedent") while he was being taken into custody by Oklahoma County Sheriff's deputies.

On April 4, 1993, the Oklahoma County Sheriff's Office was called to an apartment which was the residence of the Decedent, the Decedent's wife and their child by a "911" call made by the Decedent's wife, in which she stated that he was violent, suicidal and armed with a gun. After a stand off of several hours and one shot fired at a deputy, Sheriff's deputies obtained a warrant to take Decedent into custody. As the deputies were in the process of executing the warrant, Decedent met them with a raised rifle.

The Oklahoma County District Attorney and a Shooting Review Committee of the Oklahoma County Sheriff's Department reviewed the matters involved in the shooting of Decedent by Deputies Scott Cannon and Marshall McDonald. Both concluded that the use of deadly force was reasonable in this instance.

Respondents' lawsuit was grounded on several causes of action including alleged violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments, as well as various state laws. Petitioners Sharp, Cannon, and McDonald in their individual capacities filed motions for summary judgment based on qualified immunity grounds. Sharp also filed a motion for summary judgment based on his official capacity as Sheriff of Oklahoma County. Further, Oklahoma County moved for summary judgment.

In an order dated March 13, 1995, the District Court granted summary judgment for Petitioner Sharp in his official capacity as to Respondents' Fourth Amendment claims under section 1983, including use of excessive force and failure to train. The District Court also granted summary judgment in favor of Oklahoma County on Respondents' state law claims and granted summary judgment for Sharp and Oklahoma County as to Respondents' Eighth Amendment claims of deliberate indifference to serious medical needs and as to Respondents' claim of "conspiracy to tort". The District Court denied the qualified immunity defense of individual Petitioners Sharp, Cannon, McDonald.

Both Petitioners and Respondents filed Notices of Appeal with the United States Court of Appeals for the Tenth Circuit. On or about April 24, 1995, the Tenth Circuit issued a Show Cause Order requesting the parties to brief the issue of whether the order being appealed by both the Plaintiff and Defendants in 95-6163 and 95-6165 were immediately appealable. The Tenth Circuit ordered the parties to brief the applicability of *Johnson v. Jones*, 515 U.S. ___ , 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), to the

issue of appeals from denial of qualified immunity. Both parties addressed the issue. The Tenth Circuit cited 28 U.S.C. Section 1291 in its decision that the court only had jurisdiction to hear appeals from "final decisions." The Tenth Circuit concluded that the Petitioners' appeal was barred by *Johnson v. Jones, supra.*

Petitioner seeks review of the Tenth Circuit's order stating it lacked jurisdiction to decide Petitioners' appeal of the district court's denial of qualified immunity.

REASONS FOR GRANTING THE WRIT

1. IN ACCORDANCE WITH *BEHRENS V. PELLETIER* THE TENTH CIRCUIT SHOULD HAVE EXERCISED JURISDICTION REGARDING PETITIONERS' DEFENSE OF QUALIFIED IMMUNITY AS A "FINAL APPEALABLE ORDER".

The Tenth Circuit held it lacked jurisdiction to entertain Petitioners' qualified immunity appeal because the district court set forth certain "genuine" issues of fact for trial. The Tenth Circuit applied the reasoning of *Johnson v. Jones,* 515 U.S.___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and held the denial of the individual defendants' qualified immunity defense was not a "final decision" subject to appellate review within the meaning of 28 U.S.C. Section 1291.

Petitioners assert the existence of material fact issues remaining for trial does not preclude Appellate review from denial of individual qualified immunity defenses. As stated in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the qualified-immunity

defense "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." *Id.*, at 818, 102 S.Ct. at 2738 (citing *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978)). Petitioners assert the *Harlow* criterion of "objective reasonableness" was met in this case when the district court specifically held that a "jury could conclude the defendants' actions were reasonable and justified under the facts and circumstances confronting officers at the time." (App. 6). The district court found nineteen material issues of uncontested fact and held, as a matter of law, that the individual officers' training in use of force and in handling mental health subjects, barricaded subjects and tactical negotiation were constitutional. (App. 31).

This Court has recently decided the issue of qualified immunity as it relates to second appeals in *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834 (1996). The *Behrens* decision was published on February 10, 1996. Time constraints made it impossible to cite *Behrens* in Petitioners' Brief in Chief to the Tenth Circuit Court of Appeals. However, *Behrens* was raised by Petitioners at oral argument on March 6, 1996. The Tenth Circuit court failed to address the effect of *Behrens* on its decision in its Order dated April 1, 1996.

Behrens, supra, is the controlling law in the instant case. *Behrens* defines the defense of qualified immunity, stating that:

> " . . . the defense is meant to give government officials a right, not merely to avoid 'standing trial', but also to avoid the burdens of such

> *pretrial* matters . . . , as an [i]nquiries of this kind can be particularly disruptive of effective government."

Behrens at 4084 (citing *Mitchell v. Forsyth*, 105 S.Ct. 2806 (1985) and *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982)). *Behrens* holds that such an order is appealable to the circuit court. *Behrens* at 4085. Although the *Behrens* case addresses the scope of *Johnson v. Jones*, 115 S.Ct. 2151 (1995), the Tenth Circuit ignored it. *Behrens* limits the effect of *Johnson*, on the issues of appeals based on qualified immunity.

Petitioners assert that what a "party may or may not be able to prove at trial" – or in other words – the "evidence sufficiency" question in *Johnson v. Jones*, ___U.S.___, 115 S.Ct. 2151, 2156 (1995), should not be used as a blanket pronouncement that all individual defendants' qualified immunity defenses are not appealable. As stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986) it is the district court's task, in deciding whether there is a "genuine" issue of fact, to determine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." In this instance, the district court did just that. In denying Respondents' summary judgment on the issue of excessive force, the district court explicitly found there was "significant probative evidence in this case that a jury could conclude the defendants' actions were reasonable and justified under the facts and circumstances confronting the officers at the time." (App. 28). *Johnson* should not be extended to bar appellate jurisdiction when a district court has made a finding that "objective legal reasonableness" under *Harlow* has been met. In the instant case, the

Tenth Circuit should have undertaken the task of reviewing the record of the district court instead of holding *Johnson, id.*, bars appellate jurisdiction.

As stated in *Behrens v. Pelletier*, ___U.S.___, 116 S.Ct. 834, 842 (1996), an appellate court's assertion that "appeal of denial of the summary judgment motion is not available because denial rested on the ground [m]aterial issues of fact remain", is a misreading of *Johnson v. Jones*. *Behrens* recognizes that under certain circumstances, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Behrens* at 842 citing *Johnson, supra*, at ___, 115 S.Ct. at 2159.

CONCLUSION

The Petitioners assert that the appellate court erred in ruling it lacked jurisdiction to act on the issue of qualified immunity for the Petitioners in this case. Based on the facts of this case, the Tenth Circuit's reliance on *Johnson* was misplaced. This Court, in *Behrens*, held that an order denying qualified immunity is a final appealable order. It is the duty of the Tenth Circuit to hear an appeal on this issue. For these reasons Petitioners ask the Court to reverse the Order of the Tenth Circuit Court of

Appeals' finding that it had no jurisdiction over Petitioners' appeal.

Respectfully submitted,

ROBERT H. MACY
District Attorney

PATRICK J. MORGAN, OBA #6400
First Assistant District Attorney

JOHN M. JACOBSEN, OBA #11879
Assistant District Attorney
505 County Office Building
Oklahoma City, Oklahoma 73102
(405) 278-1600
Attorneys For Petitioners

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUZANNE MYERS, Administratrix of the Estate of Thomas James Myers, deceased; SAMSON MYERS, individually, and through Suzanne Myers, his parent and next friend; and SUZANNE MYERS, individually,

Plaintiffs-Appellees, Cross-Appellants,

v.

OKLAHOMA COUNTY BOARD OF COUNTY COMMISSIONERS, JOHN DOE, individually and as a Deputy of the Oklahoma County Sheriff's Department,

Defendant,

J.D. SHARP, individually and as Sheriff of Oklahoma County; SCOTT CANNON, individually and as a Deputy Sheriff of the Oklahoma County Sheriff's Department; MARSHALL McDONALD, individually and as a Deputy Sheriff of the Oklahoma County Sheriff's Department,

Defendants-Appellants, Cross-Appellees.

No. 95-6125
No. 95-6165

(Filed
May 10, 1996)

JUDGMENT
Entered April 1, 1996

Before BRISCOE, HOLLOWAY, and MURPHY, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, the appeals are dismissed for lack of jurisdiction.

Entered for the Court

PATRICK FISHER, Clerk

/s/ Opal A. Carter
By Opal A. Carter

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SUZANNE MYERS, Administratrix of the Estate of Thomas James Myers, deceased; SAMSON MYERS, individually, and through Suzanne Myers, his parent and next friend; and SUZANNE MYERS, individually,	)	
Plaintiffs-Appellees,	)	No. 95-6125 No. 95-6163
v.	)	
OKLAHOMA COUNTY BOARD OF COUNTY COMMISSIONERS; JOHN DOE, individually and as a Deputy of the Oklahoma County Sheriff's Department,	)	(Filed Apr. 1, 1996)
Defendant,	)	
J.D. SHARP, individually and as Sheriff of Oklahoma County; SCOTT CANNON, individually and as a Deputy Sheriff of the Oklahoma County Sheriff's Department; MARSHALL McDONALD, individually and as a Deputy Sheriff of the Oklahoma County Sheriff's Department,	)	
Defendants-Appellants.	)	

Appeal from United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-94-246-M)

John M. Jacobsen, Assistant District Attorney, (Robert H. Macy, District Attorney, and Patrick J. Morgan, Assistant District Attorney, with him on the brief), of Oklahoma City, Oklahoma, for the appellants.

Carl J. Franklin, of Norman, Oklahoma, for the appellees.

Before BRISCOE, HOLLOWAY, and MURPHY, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiffs Suzanne Myers and Samson Myers filed this 42 U.S.C. § 1983 action against the Board of County Commissioners of Oklahoma County and various officers of the Oklahoma County Sheriff's Department for the shooting death of Thomas James Myers. The individual defendants, including J.D. Sharp, appeal the district court's denial of their motion for summary judgment on the defense of qualified immunity (No. 95-6125). Plaintiffs appeal the district court's order granting summary judgment to defendant Sharp in his official capacity (No. 95-6163).

Suzanne Myers called 911 to request assistance after her husband Thomas locked himself inside the family's home and refused to allow her to enter. Suzanne knew that Thomas had a .22 rifle with him in the residence, and

she also believed that he was intoxicated, depressed, and suicidal. Bethany police officers responded to the call shortly after noon. At approximately 1:30 p.m., Oklahoma County sheriff's officers arrived on the scene and took control of the situation. The sheriff's officers established contact with Thomas and began negotiating with him in an attempt to persuade him to abandon the weapon and leave the residence. After failing to convince Thomas to leave the residence, sheriff's officers obtained a voluntary third-party statement from Suzanne and presented it to a special district judge, who issued an order of forcible entry and detention.

At approximately 8:00 p.m., sheriff's officers entered the residence to enforce the order and to attempt to take Thomas into protective custody. Sergeant Marshall McDonald was the first officer to enter the residence. He alleged that he observed Thomas begin to rise from a couch with a rifle in his hands and point the rifle directly at him. Sergeant Scott Cannon, who was immediately behind McDonald, alleged that he too observed Thomas rise from the couch, turn toward the officers, and raise his rifle. Although McDonald stated that he yelled "Freeze, Police," Thomas allegedly put the rifle to his shoulder and looked down the sight of the rifle at McDonald. McDonald and Cannon fired several rounds from their pistols at Thomas, and Thomas died as a result of gunshot wounds.

In the complaint filed in this action, plaintiffs claimed defendants deprived them of various constitutional rights in violation of 42 U.S.C. § 1983. Specifically, plaintiffs claimed defendants used excessive force in attempting to

take Thomas into custody. Motions for summary judgment were filed by plaintiffs, by the defendants sued in their individual capacities, and by the Board of County Commissioners and Sharp sued in their official capacities. In their summary judgment motions, defendants asserted their defense of qualified immunity. In denying plaintiffs' motion, the district court found "there [wa]s significant probative evidence [from which] a jury could conclude the defendants' actions were reasonable and justified under the facts and circumstances confronting the officers at the time." Order of 3/10/95 at 4-5.

On March 13, 1995, the court issued two separate orders disposing of the remaining motions for summary judgment. With respect to the individual defendants' motion, the district court found there was a genuine issue for trial regarding the reasonableness of defendants' actions and the individual defendants were not entitled to qualified immunity on plaintiffs' excessive force claim. As for the motion filed by the Board of County Commissioners and defendant Sharp in his official capacity, the district court concluded that summary judgment was appropriate.

The individual defendants appeal the district court's order denying them qualified immunity, and plaintiffs appeal the court's order granting summary judgment in favor of defendant Sharp in his official capacity. We first address whether we have jurisdiction to consider either of these appeals. In answering this question, we review the appeals in the order in which they were filed.

Defendants' Appeal – No. 95-6125

Under 28 U.S.C. § 1291, this court has jurisdiction to hear appeals only from "final decisions" of district courts. In light of this statutory limitation, interlocutory appeals are the exception and not the rule. *Johnson v. Jones*, 115 S.Ct. 2151, 2154 (1995). One well recognized exception allows public officials asserting a defense of qualified immunity to appeal a district court's denial of summary judgment on that defense if the issue on appeal is whether the constitutional right that was allegedly violated was "clearly established." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). However, this exception does not allow an immediate appeal of a "district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 115 S.Ct. at 2159; *see Sevier v. City of Lawrence*, 60 F.3d 695, 700 (10th Cir. 1995).

Here, the district court denied summary judgment to the individual defendants on their qualified immunity defense on the sole basis that "there [was] a genuine issue for trial regarding the reasonableness of defendants' conduct." Order of 3/13/95 at 8. More specifically, the court noted that "plaintiffs raised several factual issues from which a reasonable person could conclude the degree of force used by the defendants was excessive under the facts and circumstances at the time." *Id.* at 5.

Prior to the filing of opening briefs, this court issued an order directing the parties to address what effect, if any, *Johnson* has upon this court's jurisdiction to consider these appeals. Defendants claim that *Johnson* "should have no effect on the jurisdiction of this Court" because,

in denying plaintiffs' motion for summary judgment, the court specifically held that a "jury could conclude the defendants' actions were reasonable and justified under the facts and circumstances confronting the officers at the time." Appellants' br. at 34-35. In so holding, defendants argue, the court "effectively concluded the officers did not use unreasonable force," and "effectively declared that the officers did not violate clearly established law." *Id.* at 35. Defendants proceed to argue "this finding" should have entitled them to summary judgment on their individual qualified immunity defense. Defendants assert the court's March 13 order denying defendants summary judgment on their individual qualified immunity defense contradicted the court's March 10 order which effectively found defendants' actions were objectively reasonable.

Defendants have misread the district court's rulings. The court did not conclude that defendants' actions as individual defendants were reasonable or unreasonable. Rather, in denying plaintiffs' motion for summary judgment, the court simply concluded that defendants had presented sufficient evidence from which a jury could find in their favor. In other words, consistent with its denial of the individual defendants' motion for summary judgment on their individual qualified immunity defense, the court concluded that genuine issues of material fact existed with respect to the reasonableness of defendants' conduct. Thus, although defendants argue their appeal is not barred by *Johnson*, we conclude otherwise.

In passing, it should be noted that, although defendants' appeal focuses almost exclusively on the factual evidence which would support a judgment in defendants'

favor on individual qualified immunity grounds, defendants have arguably challenged the propriety of the legal standard used by the district court in denying their motion for summary judgment. Specifically, defendants argue the district court "erred in basing [its summary judgment decision] on a *'reasonable person'* standard rather than what a *'reasonable law enforcement'* officer would have done.' " Appellants' br. at 22 (emphasis in original). Again, defendants have misread the court's order. In referring to a "reasonable person," the court was obviously referring to a reasonable factfinder (i.e., a juror). The court was not, as suggested by defendants, altering the standard to be applied in determining whether a law enforcement officer's use of force was reasonable.

We conclude this court is without jurisdiction to review defendants' appeal.

Plaintiffs' Appeal – No. 95-6163

It is well settled that we can only address the underlying merits of a lawsuit if the requirements for appellate jurisdiction outlined in 28 U.S.C. § 1291 are satisfied. *D & H Marketers v. Freedom Oil & Gas*, 744 F.2d 1443, 1444 (10th Cir.1984). Under § 1291, we have jurisdiction only over "final" decisions of the district court; that is, those decisions that leave "nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Notably, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). Thus, a district court's decision is

appealable if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

To come within *Cohen's* collateral order doctrine, an "order must '[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.' " *Utah State Dept. of Health v. Kennecort Corp.*, 14 F.3d 1489, 1492 (10th Cir.) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), *cert. denied* 115 S. Ct. 197 (1994). Jurisdiction is not available under the collateral order doctrine unless all three of these requirements are met. *Id.*

Here, the collateral order doctrine does not apply. The collateral order doctrine does not apply most notably because the district court's order granting summary judgment in favor of defendant Sharp in his official capacity will be reviewable on appeal from the district court's final judgment. Further, plaintiffs sought neither immediate entry of judgment under Rule 54(b) nor certification for an interlocutory appeal under 28 U.S.C. § 1292(b). We are therefore without jurisdiction to review plaintiffs' appeal.

Both the individual defendants' appeal, No. 95-6125, and the plaintiffs' appeal, No. 95-6162, are DISMISSED for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SUZANNE MYERS, et al., Plaintiffs,	)	
vs.	)	Case No. CIV-94-246-M
COUNTY OF OKLAHOMA COUNTY, et al., Defendants.	)	

ORDER

(Filed Mar. 13, 1995)

This matter comes before the Court on the Motion for Summary Judgment filed by defendants Board of County Commissioners of Oklahoma County ("County") and J.D. Sharp ("Sharp"), in his official capacity as Sheriff of Oklahoma County, December 1, 1994, pursuant to Fed. R. Civ. P. 56. Plaintiffs responded in opposition December 16, 1994. Based upon the parties' submissions and the following undisputed facts, the Court makes its determination.

1. On April 4, 1993, plaintiff Suzanne Myers called "9-1-1" to request assistance with her husband, the decedent Tom Myers.

2. Tom Myers had locked himself in the family home and refused to allow Suzanne Myers to enter the home.

3. Suzanne Myers believed her husband to be intoxicated and depressed.

4. Shortly after noon on April 4, 1993, the Bethany Police Department responded to the scene and sometime between 12:30 p.m. and 1:30 p.m. members of the Oklahoma County Sheriff's Department arrived on the scene and took control of the situation.

5. Gene McPherson, a supervisor and Lieutenant with the Oklahoma County Sheriff's Department, conversed with Tom Myers through an opening in the sliding glass door.

6. Tom Myers had a loaded gun.

7. Tom Myers told Gene McPherson he had been drinking and was intoxicated.

8. While Tom Myers and Gene McPherson were conversing, Tom Myers fired a shot.

9. Lt. Neal Troutman, trained negotiator with the Oklahoma County Sheriff's Department, took control of the situation.

10. Lt. Troutman did not speak directly with Gene McPherson nor receive any information directly from him.

11. Lt. Troutman spoke to Tom Myers by telephone several times during the day.

12. Tom Myers told Lt. Troutman that he was "tired of living" and wanted "to die".

13. Tom Myers did not exit the apartment at any time.

14. Suzanne Myers completed a voluntary statement which was taken to Judge Charles Kelley, a Special District Judge of the Oklahoma County District Court.

15. Judge Kelley issued an Order of Detention and Forcible Entry.

16. On the afternoon of April 4, 1993, Sheriff J.D. Sharp arrived on the scene.

17. On the afternoon of April 4, 1993, Sergeants Scott Cannon and Marshall McDonald entered the home of Tom Myers.

18. Sergeants Cannon and McDonald fired nine shots at Tom Myers.

19. Tom Myers died as a result of the gunshot wounds he received.

Plaintiffs have alleged in their complain that defendants deprived them of various constitutional rights in violation of title 42, section 1983 of the United States Code. Plaintiffs have also alleged defendants are liable under state law.

DISCUSSION

1. Fourth Amendment Claims

Defendants argue they are entitled to summary judgment on the grounds that no Oklahoma County Sheriff's Department employee or Board employee violated plaintiffs' decedent's Fourth Amendment rights. Plaintiffs have alleged defendants are liable for the use of excessive force by its officers.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court made clear that local governmental entities can be held liable under section 1983 only if the deprivation of a federally-protected constitutional right is the result of action taken pursuant to official government policy or custom. The Supreme Court emphasized that these entities cannot be held liable under section 1983 under a theory of respondeat superior. *Id.* at 691 (municipality cannot be held liable solely because it employs tortfeasor). Liability arises only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edits or acts may fairly be said to represent official policy, inflicts the injury. . . . " *Id.* at 694; *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (officially sanctioned or ordered acts of officials are acts of government entity); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (governmental entity not liable under section 1983 for acts of official unless official possessed final policymaking authority to establish policy with respect to acts in question).

Furthermore, the Supreme Court in *City of Canton v. Harris*, 489 U.S. 378, held municipal liability under section 1983 attaches "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' . . . can a city a be liable for such a failure under §1983." Therefore, municipal liability for failure to train must amount to "deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The Tenth Circuit likewise acknowledged that a "supervisor or the municipality may be liable in a §1983 action brought for excessive use of force by the police

'[w]here there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable.' " *Houston v. Reich*, 932 F.2d 883, 888 (10th Cir. 1991) (quoting *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988)).

Defendants have first argued that they are entitled to summary judgment on plaintiffs' claims under the Fourth Amendment to the United States Constitution because plaintiffs have failed to demonstrate that the officers inflicted constitutional harm. Defendants contend "absent a finding that the use of deadly force was not appropriate in this case, a governmental entity cannot be held liable based on the actions of one of its officers when in fact it has been determined that the officer inflicted no constitutional harm." *See* Defendants' Motion for Summary Judgment at p. 12.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1986) held

> "that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest . . . or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."

Id. at 395 (emphasis deleted). The Supreme Court stated further that

> "As in other Fourth Amendment contexts, . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances

> confronting them, without regard to their underlying intent or motivation."

490 U.S. at 396-97 (citations omitted).

The Tenth Circuit has frequently noted that whether the police used excessive force in section 1983 cases is usually a question for the factfinder. *See Quezada v. County of Bernalillo,* 944 F.2d 710, 715 (10th Cir. 1991). Furthermore, plaintiffs have presented sufficient probative evidence in this case to require submission of their claim of excessive force to a jury. Therefore, defendants assertion that no unconstitutional deprivation of a federally protected right has occurred is yet to be decided.

However, in their response, plaintiffs have failed to identify any policy or custom of the County, whether made by lawmakers or by an official possessing final policymaking authority, which resulted in or is affirmatively linked to the alleged violation of plaintiffs' decedent's Fourth Amendment rights. Plaintiffs have failed to provide any evidence that the County's policies or customs were the moving force behind the alleged use of excessive force. Accordingly, the County is entitled to summary judgment on the plaintiffs' Fourth Amendment claim under section 1983.

Plaintiffs also claim defendant Sharp, in his official capacity, is liable for the officers' alleged use of excessive force. "A supervisor is not liable under section 1983 unless an 'affirmative link' exists between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or direction, or his failure to supervise.' " *Meade v. Grubbs,* 841 F.2d 1512, 1527 (10th Cir. 1988) (citing *Specht v. Jenson,* 832 F.2d 1516,

1524 (10th Cir. 1987)). "Unless a supervisor has established or utilized an unconstitutional policy or custom, a plaintiff must show that the supervisory defendant breached a duty imposed by state or local law which caused the constitutional violation." *Id.* at 1528 (citations omitted). Since a sheriff is responsible for the conduct of his deputies, "a sheriff is accountable in a §1983 action whenever a sheriff, in a position of responsibility, knew or should have known of the misconduct, and yet failed to prevent future harm." *Id.* (citing *Anthony v. Baker*, 767 F.2d 657, 666 (10th Cir. 1985)). Plaintiffs have failed to provide sufficient evidence that Sharp established an unconstitutional policy or breached a duty imposed by state or local law which violated plaintiff Tom Myers' Fourth Amendment rights. Furthermore, plaintiffs have failed to present any facts showing defendant Sharp knew or should have known of any alleged misconduct of his officers. While plaintiffs contend Sharp was present at the scene and made the decision to enter Tom Myers' apartment, plaintiffs provide no evidence that Sharp authorized any use of excessive force. Defendant Sharp likewise is entitled to summary judgment on this claim.

Finally, the Court finds plaintiffs' failure-to-train claims meritless[1]. As defendants correctly point out, the County has no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies. *See Meade,*

---

[1] Defendants have moved for summary judgment on the issue of whether the training of Oklahoma County deputies is constitutional and legal. The Court will address this issue in relation to plaintiffs' allegations in their amended complaint that defendants are liable for failing to train the officers. *See* Plaintiffs' Amended Complaint ¶¶30-31.

841 F.2d at 1528. As to defendant Sharp, plaintiffs fail to present facts sufficient to satisfy the deliberate indifference standard defined by the Supreme Court in *City of Canton v. Harris*. Plaintiffs must come forward with some evidence to show Sharp essentially failed to train his officers in the use of deadly force or that the training programs were so inadequate as to amount to no training at all. Defendants submitted extensive evidence of departmental training on mental health, deadly force, tactical team procedures and negotiation skills. Sharp is entitled to summary judgment on this claim as well.

2. State Law Claims

Defendant County argues it is immune from plaintiffs' state law claims pursuant to the Oklahoma Governmental Tort Claims Act ("Act"), Okla. Stat. tit. 51 §§ 151 *et seq*. Specifically, the County argues is it immune under §§ 155(3), 155(4), 155(5) and 155(6).

The cited portions of section 155 provide:

The State or a political subdivision shall not be liable if a loss or claim results from:

. . .

(3) Execution or enforcement of the lawful orders of any court.

(4) Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including but not limited to, any statute, charter provision, ordinance, . . .

(5) Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;

(6) Civil disobedience, riot, insurrection or rebellion or the failure to provide or the method of providing, police, law enforcement or fire protection.

* * * *

The County contends subsection (3) applies because the decision to enter Tom Myers' apartment was done pursuant to a court order. It argues subsection (4) applies because Oklahoma County deputies were attempting to enforce state law, namely Okla. Stat. tit. 43A § 5-207(B)[2]. It argues subsection (5) applies because any training involved in this case was discretionary by Defendant Sharp, not the County Board. The County argues subsection (6) applies because the deputies' training program was the method of providing police protection. The Court agrees. Accordingly, defendant County is immune from liability on plaintiffs' state law claims.

3. Eighth Amendment Claim – Deliberate Indifference

Defendants correctly argue plaintiffs' claim of deliberate indifference to serious medical needs under the

---

[2] Okla. Stat. tit. 43A §5-207(B) reads:

> Any peace officer who reasonably believes that a person is a person requiring treatment, an alcohol-dependent person, or a drug-dependent person to a degree that immediate emergency action is necessary shall take said person into protective custody. The officer shall make every reasonable effort to take the person into custody in the least conspicuous manner.

Eighth Amendment is erroneous because the Eighth Amendment applies to convicted persons. However, the Tenth Circuit has recognized that pretrial detainees are entitled to the same degree of medical attention as convicted inmates under the Fourteenth Amendment's Due Process Clause. *Martin v. Board of County Comm'rs of Pueblo County*, 909 F.2d 402, 406 (10th Cir. 1990). Deliberate indifference is shown by the failure to provide prompt attention to serious medical needs.

As discussed earlier in this Order, to successfully state a section 1983 claim against the County, plaintiffs must present evidence of the County's policies or customs that were the moving force behind this alleged constitutional violation. The Court finds plaintiffs have failed to submit any evidence which would allow this claim to survive summary judgment. The County is entitled to summary judgment on the plaintiffs' Eighth Amendment claim.

The same analysis the Court used for supervisory liability against defendant Sharp for the alleged Fourth Amendment violation applies to this alleged Eighth Amendment violation. Plaintiffs must identify facts sufficient to show Sharp established or utilized an unconstitutional policy or breached a duty imposed by law which caused this alleged violation of Tom Myers' Eighth Amendment rights. Again, the Court finds plaintiffs have failed to come forward with sufficient evidence to preclude summary judgment. Defendant Sharp is likewise entitled to summary judgment on this claim.

4. "Conspiracy to Tort"

Finally, on plaintiffs' claim for "conspiracy to tort", the Court finds such claim does not survive the defendants' request for summary judgment. In their response, the plaintiff did not oppose the defendants' arguments regarding this claim; in fact, plaintiffs' response made no reference to their claim for "conspiracy to tort".

CONCLUSION

Based on the foregoing, the Court finds the defendants' Motion for Summary Judgment [Docket #36] should be and is hereby

(1) GRANTED as to plaintiffs' Fourth Amendment claims under section 1983, including use of excessive force and failure-to-train;

(2) GRANTED as to plaintiffs' state law claims against defendant County;

(3) GRANTED as to plaintiffs' Eighth Amendment claim under section 1983 of deliberate indifference to serious medical needs; and

(4) GRANTED as to plaintiffs' claim of "conspiracy to tort".

ENTERED this 13th day of March, 1995.

/s/ Vicki Miles-laGrange
VICKI MILES-laGRANGE
UNITED STATES
DISTRICT JUDGE
ENTERED IN JUDGEMENT
DOCKET ON 3-13-95

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SUZANNE MYERS, et al., Plaintiffs,	)	CIV 94-246-M
vs.	)	
THE COUNTY OF OKLAHOMA COUNTY, et al., Defendants.	)	

NOTICE OF APPEAL

(Filed March 15, 1995)

Notice is hereby given that J.D. Sharp, Scott Cannon and Marshall McDonald, in their individual capacities, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Orders denying them qualified immunity in their individual capacities, entered on March 10 and March 13, 1995, copies of the Orders attached herein. Defendants J.D. Sharp, Scott Cannon and Marshall McDonald assert they are entitled to the right of immediate appeal from the denial of their affirmative defense and claim of qualified immunity under Title 28 U.S.C. § 1291. If found that such denial of qualified immunity is not appealable under Section 1291, Defendants seek appeal under Title 28 U.S.C. § 1292.

Respectfully submitted,

ROBERT H. MACY
DISTRICT ATTORNEY

/s/ Patrick J. Morgan
Patrick J. Morgan, OBA #6400
John M. Jacobsen, OBA #11879

Assistant District Attorneys
505 County Office Building
Oklahoma City, Oklahoma 73102
(405) 278-1600
ATTORNEYS FOR DEFENDANT/
APPELLANT J.D. SHARP

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of March, 1995, a true and correct copy of the foregoing Notice of Appeal was mailed, postage prepaid, to the following:

Carl J. Franklin
330 W. Gray, Suite 411
Norman, Oklahoma 73069

/s/ John M. Jacobsen

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SUZANNE MYERS, et al.,	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	CIV 94-246-M
THE COUNTY OF OKLAHOMA COUNTY, et al.,	)	
Defendants.	)	

ORDER

(Filed Mar. 10, 1995)

This matter comes before the Court on the Motion for Summary Judgment filed by plaintiffs, December 1, 1994, pursuant to Fed. R. Civ. P. 56. Defendants responded in opposition December 16, 1994. Based upon the parties' submissions and the following undisputed facts, the Court makes its determination.

1. On April 4, 1993, plaintiff Suzanne Myers called "9-1-1" to request assistance with her husband, the decedent Tom Meyers.

2. Tom Meyers had locked himself in the family home and refused to allow Suzanne Meyers to enter the home.

3. Suzanne Meyers believed her husband to be intoxicated and depressed.

4. Shortly after noon on April 4, 1993, the Bethany Police Department responded to the scene and sometime

between 12:30 p.m. and 1:30 p.m. members of the Oklahoma County Sheriff's Department arrived on the scene and took control of the situation.

5. Gene McPherson, a supervisor and Lieutenant with the Oklahoma County Sheriff's Department, conversed with Tom Myers through an opening in the sliding glass door.

6. Tom Myers had a loaded gun.

7. Tom Myers told Gene McPherson he had been drinking and was intoxicated.

8. While Tom Meyers and Gene McPherson were conversing, Tom Meyers fired a shot.

9. Lt. Neal Troutman, trained negotiator with the Oklahoma County Sheriff's Department, took control of the situation.

10. Lt. Troutman did not speak directly with Gene McPherson nor receive any information directly from him.

11. Lt. Troutman spoke to Tom Myers by telephone several times during the day.

12. Tom Myers told Lt. Troutman that he was "tired of living" and wanted "to die".

13. Tom Myers did not exit the apartment at any time.

14. Suzanne Myers completed a voluntary statement which was taken to Judge Charles Kelley, a Special District Judge of the Oklahoma County District Court.

15. Judge Kelley issued an Order of Detention and Forcible Entry.

16. On the afternoon of April 4, 1993, Sheriff J.D. Sharp arrived on the scene.

17. On the afternoon of April 4, 1993, Sergeants Scott Cannon and Marshall McDonald entered the home of Tom Meyers.

18. Sergeants Cannon and McDonald fired nine shots at Tom Meyers.

19. Tom Meyers died as a result of the gunshot wounds he received.

Plaintiffs have alleged in their complaint that defendants deprived them of various constitutional rights in violation of title 42, section 1983 of the United States Code. Plaintiffs have also alleged defendants are liable under state law.

Plaintiffs argue that they are entitled to summary judgment on their claim of excessive force in violation of their Fourth and Fourteenth Amendment rights. Plaintiffs contend the decision of the defendants to seize Tom Meyers was unjustified since he did not pose an immediate threat to himself or others and had not committed any criminal act. Furthermore, plaintiffs contend the defendants' decision to use a tactical team to enter Tom Meyers' residence was unjustified and was the ultimate cause of deadly force being used at the scene. Plaintiffs argue there were other tactics available to defendants that were never considered. As such, plaintiffs contend, defendants' decisions and subsequent actions led to the use of excessive force.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1986), held

> "that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest . . . or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."

Id. at 395 (emphasis deleted). The Supreme Court stated further that

> "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interest" ' against the countervailing governmental interests at stake. [*Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. *See Terry v. Ohio*, 392 U.S. [1, 22-27 (1968)]. Because '[t]he tort of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.' *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See*

> *Tennessee v. Garner*, 471 U.S. at 8-9 (the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure').
>
> . . . .
>
> "As in other Fourth Amendment contexts, . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

490 U.S. at 396-97 (citations omitted).

The defendants' actions must be judged under the Fourth Amendment standard of reasonableness. In applying this standard to defendants' actions at the time of their entry into Tom Meyers' residence, the Court has examined the evidence and all reasonable inferences drawn therefrom in the light most favorable to the defendants. The Court must decide whether this "evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that on [sic] party must prevail as a matter of law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986), on the plaintiffs' claim of excessive force.

The Court finds there is significant probative evidence in this case that a jury could conclude the defendants' actions were reasonable and justified under the facts and circumstances confronting the officers at the time. Accordingly, plaintiffs are not entitled to summary judgment on this claim.

Plaintiffs have also argued they are entitled to summary judgment on their claim of illegal seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiffs contend Judge Kelley's Order of Detention and Forcible Entry was issued without a written affidavit in violation of Okla. Stat. tit. 43A O.S. § 5-207(C) (1990)[1]. Plaintiffs also contend additional statements were added to Judge Kelley's order rendering it an "open warrant". Therefore, plaintiffs argue, this defective order constituted, in essence, a wrongful seizure of Tom Meyers.

Again, the Court must consider the reasonableness of the defendants' actions because "reasonableness" is the touchstone for any Fourth Amendment inquiry. At this stage, the Court must not weigh the evidence, judge the credibility of the parties or witnesses or determine the truth of the matter. The Court must only determine if there is a genuine issue for trial regarding the reasonableness of the defendants' conduct.

The record shows sufficient disagreement regarding whether or not Judge Kelley's order was altered. Furthermore, defendants submitted Judge Kelley's affidavit in which he swore that even if additional statements were

---

[1] Okla. Stat. tit. 43A § 5-207 provides authority for emergency detention of persons appearing to be mentally ill, alcohol-dependent or drug-dependent. 5-207(B) authorizes any peace officer who reasonably believes a person needs treatment to take such person into protective custody. 5-207(C) requires the officer to prepare a written affidavit indicating the basis for his belief that the person requires treatment and the circumstances under which he took the person into protective custody.

added after he issued the order, he still believed there was probable cause at the time to issue the order based upon Suzanne Meyers' voluntary statement. Because there is a genuine dispute as to the validity of the Order of Detention and Forcible Entry and the reasonableness of defendants' actions in relying upon that order, plaintiffs are not entitled to summary judgment on their claim for wrongful seizure.

Finally, plaintiffs moved for summary judgment on the issue of defendants' acting under color of law as defined and required in title 42, section 1983 of the United States Code. Whether the defendants were acting under the color of law is an element of plaintiffs' section 1983 claims. Defendants admit they were acting in their official capacities as law enforcement officers. Therefore, the parties may stipulate to this element of the plaintiffs' section 1983 claims at the appropriate time.

Based on the foregoing, the Court finds that plaintiffs' Motion for Summary Judgment [Docket # 34], should be and is hereby DENIED.

IT IS SO ORDERED this 10th day of March, 1995.

/s/ Vicki Miles-LaGrange
VICKI MILES-LAGRANGE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SUZANNE MYERS, et al.,	)	
Plaintiffs,	)	Case No. CIV-94-246-M
vs.	)	
COUNTY OF OKLAHOMA COUNTY, et al.,	)	
Defendants.	)	

ORDER

(Filed March 13, 1995)

This matter comes before the Court on the Motion for Summary Judgment filed by defendants J.D. Sharp, Scott Cannon and Marshall McDonald December 1, 1994, pursuant to Fed. R. Civ. P. 56. Plaintiffs responded in opposition December 16, 1994. Based upon the parties' submissions and the following undisputed facts, the Court makes its determination.

1. On April 4, 1993, plaintiff Suzanne Myers called "9-1-1" to request assistance with her husband, the decedent Tom Meyers.

2. Tom Meyers had locked himself in the family home and refused to allow Suzanne Meyers to enter the home.

3. Suzanne Meyers believed her husband to be intoxicated and depressed.

4. Shortly after noon on April 4, 1993, the Bethany Police Department responded to the scene and sometime

between 12:30 p.m. and 1:30 p.m. members of the Oklahoma County Sheriff's Department arrived on the scene and took control of the situation.

5. Gene McPherson, a supervisor and Lieutenant with the Oklahoma County Sheriff's Department, conversed with Tom Myers through an opening in the sliding glass door.

6. Tom Myers had a loaded gun.

7. Tom Myers told Gene McPherson he had been drinking and was intoxicated.

8. While Tom Meyers and Gene McPherson were conversing, Tom Meyers fired a shot.

9. Lt. Neal Troutman, trained negotiator with the Oklahoma County Sheriff's Department, took control of the situation.

10. Lt. Troutman did not speak directly with Gene McPherson nor receive any information directly from him.

11. Lt. Troutman spoke to Tom Myers by telephone several times during the day.

12. Tom Myers told Lt. Troutman that he was "tired of living" and wanted "to die".

13. Tom Myers did not exit the apartment at any time.

14. Suzanne Myers completed a voluntary statement which was taken to Judge Charles Kelley, a Special District Judge of the Oklahoma County District Court.

15. Judge Kelley issued an Order of Detention and Forcible Entry.

16. On the afternoon of April 4, 1993, Sheriff J.D. Sharp arrived on the scene.

17. On the afternoon of April 4, 1993, Sergeants Scott Cannon and Marshall McDonald entered the home of Tom Meyers.

18. Sergeants Cannon and McDonald fired nine shots at Tom Meyers.

19. Tom Meyers died as a result of the gunshot wounds he received.

Plaintiffs have alleged in their complaint that defendants deprived them of various constitutional rights in violation of title 42, section 1983 of the United States Code. Plaintiffs have also alleged defendants are liable under state law. Defendants have moved for summary judgment on plaintiffs' claims of excessive force and deliberate indifference, plaintiffs' pendant state law claims and plaintiffs' claim for intentional infliction of emotional distress.

DISCUSSION

1. Excessive Force

Defendants argue they are entitled to summary judgment on plaintiffs' excessive force claim. Defendants contend the use of deadly force was justified under the circumstances.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1986), held

> "that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest . . . or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."

Id. at 395 (emphasis deleted). The Supreme Court stated further that

> "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interest" ' against the countervailing governmental interests at stake. [*Tennessee v. Garner*, 471 U.S. 1, 8 (1985)] (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. *See Terry v. Ohio*, 392 U.S. [1, 22-27 (1968)]. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S. at 8-9 (the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure').

. . . .

> "As in other Fourth Amendment contexts, . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

490 U.S. at 396-97 (citations omitted).

All cases involving excessive force allegations must be judged under the Fourth Amendment standard of objective reasonableness. The Tenth Circuit has frequently noted that whether the police used excessive force in section 1983 cases is usually a question for the fact finder. *See Quezada v. County of Bernalillo,* 944 F.2d 710, 715 (10th Cir. 1991) (citing *Street v. Parham,* 929 F.2d 537, 541 n.2 (10th Cir. 1991) and *Trujillo v. Goodman,* 825 F.2d 1451, 1458-59 (10th Cir. 1987)). Furthermore, in applying this standard to defendants' actions, the Court must examine the evidence and all reasonable inferences drawn therefrom in the light most favorable to the plaintiffs. The Court must decide whether this "evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law," *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986).

The Court finds there is sufficient probative evidence in this case to require submission of this claim to a jury. In their response, plaintiffs raised several factual issues from which a reasonable person could conclude the degree of force used by the defendants was excessive

under the facts and circumstances at the time. Accordingly, defendants are not entitled to summary judgment on this claim.

2. Deliberate Indifference

Next, defendants argue they are entitled to summary judgment on plaintiffs' claim of deliberate indifference. Plaintiffs' amended complaint alleged defendants violated plaintiff Tom Meyers' Eighth Amendment right to be provided immediate medical attention. *See* Complaint ¶ 33. The constitutional protection against deliberate indifference to a prisoner's serious medical needs as announced in *Estelle v. Gamble*, 429 U.S. 97 (1976) (eighth amendment shields prisoners after adjudication), applies to pretrial detainees through the Due Process Clause of the Fourteenth Amendment. *Martin v. Board of County Commissioners of Pueblo County*, 909 F.2d 402, 406 (10th Cir. 1990). For plaintiffs to prevail on this claim, they must prove that 1) Tom Myers had a serious medical need; 2) defendants were aware of his serious medical need; 3) defendants, with deliberate indifference, failed to provide Tom Meyers with prompt medical attention; 4) as a direct result, Tom Meyers was harmed, and 5) defendants acted under color of state law.

The Court finds that neither party addressed the foregoing elements of this claim. Therefore, defendants' motion for summary judgment is denied.

3. Qualified Immunity

Defendants argue they are qualifiedly immune from plaintiffs' constitutional claims. Plaintiffs have alleged several constitutional violations in their amended complaint.

Law enforcement officers sued in their individual capacity are entitled to qualified immunity when they could not reasonably have known that their actions violated clearly established law[1]. *Anderson v. Creighton,* 483 U.S. 635, 639 (1987). Once a defendant raises this affirmative defense, the plaintiff, to survive a motion for summary judgment "must 'come forward with facts or allegations to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the violation occurred.' " *Pallottino v. City of Rio Rancho,* 31 F.3d 1023, 1026 (10th Cir. 1994) (quoting *Pueblo Neighborhood Health Centers, Inc. v. Losavio,* 847 F.2d 642, 646 (10th Cir. 1988)).

At the time plaintiff Tom Meyers was shot the law was clearly established that he had the right not to have excessive force used against him, the right to be free from unlawful seizure, and was entitled to the same degree of protection regarding medical attention afforded convicted inmates[2].

---

[1] Plaintiffs alleged violations of the Fourth, Sixth, Eighth and Fourteenth Amendments. For purposes of this summary judgment motion, the Court will not address plaintiffs' alleged violations of the Sixth Amendment.

[2] In their complaint, plaintiffs' alleged the Eighth Amendment violation of deliberate indifference to serious

On the issue of qualified immunity in excessive force cases, the Tenth Circuit held

> "While qualified immunity is a powerful defense in other contexts, in excessive force cases the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity defense is available to the government actor."
>
> . . . .
>
> "Police use of excessive force is an established constitutional violation, *Tennessee v. Garner*, 471 U.S. 1, 7-8 . . . (1985), and in an excessive force case, the factfinder determines if the police officer is liable by deciding if the force he used was objectively reasonable."

Quezada, 944 F.2d at 718 (citations omitted).

Therefore, defendants are immune from damages in this case only if the factfinder determines the degree of force used was objectively reasonable in light of the facts and circumstances facing the defendants at the time. As stated earlier, plaintiffs have demonstrated sufficient evidence to submit their excessive force claim to a jury, thus defendants are not entitled to qualified immunity on this constitutional claim.

Plaintiffs have sought to hold defendants liable on the grounds that plaintiff Tom Meyers was wrongfully

---

medical needs. However, the Tenth Circuit has held that pretrial detainees are entitled to this protection under the Fourteenth Amendment's Due Process Clause. *See Martin*, 909 F.2d at 406.

seized under the Fourth Amendment. Plaintiffs base their claim of wrongful seizure on their contention that the Order of Detention and Forcible Entry signed by Judge Kelley was invalid. *See* discussion in Court's Order on Plaintiff's Motion For Summary Judgment at p. 5. As in any Fourth Amendment inquiry, the reasonableness of defendants' action is at issue. The Court finds there is a genuine issue for trial regarding the reasonableness of defendants' conduct. Accordingly, defendants are not qualifiedly immune from this claim.

As stated previously, the parties failed to address the elements of plaintiffs' deliberate indifference claim and thus, the Court finds defendants are not entitled to qualified immunity on this claim.

4. Pendant State Claims

Plaintiffs have sought to hold defendants liable on several state tort theories, including wrongful death, assault and battery, negligence, gross negligence, conversion, loss of consortium, "conspiracy to tort" and "outrage"[3].

Defendants first argue that for plaintiffs to prove assault and battery, plaintiffs must prove an "unlawful attempt or use of force" and "resultant injury" under Title 21 sections 641 and 642 of the Oklahoma Statutes. Defendants contend since their actions in this case were

---

[3] Plaintiffs also alleged state tort claims of mental and physical pain and anguish, pecuniary loss, grief and loss of companionship. The Court finds these are not torts but are elements of plaintiffs' damages.

justified, there has been no assault and battery. As plaintiffs correctly pointed out, this is a civil action and defendants' reliance on criminal statutes is misplaced.

Defendants next argue they are not the proper party on plaintiffs' state law claims. If an employee acts within the scope of his employment, he is entitled to the immunity provided by the Oklahoma Governmental Tort Claims Act ("Act"), Okla. Stat. tit. 51 §§151-172, and the lawsuit proceeds against the political subdivision as his employer subject to the limitations and exceptions specified in the Act. *Id.* at §153(A). If an employee acts willfully and wantonly and thus, outside the scope of his employment, he forfeits his immunity and the Act provides no protection. *See Houston v. Reich*, 932 F.2d 883 (10th Cir. 1991). The lawsuit proceeds against the employee in his individual capacity.

In this case, plaintiffs have sought not only actual damages but also punitive damages from the defendants. Defendants' actions, while performed "under color of state law" for purposes of section 1983, if done willfully and wantonly and with reckless disregard for plaintiffs' rights, are outside the scope of their employment for purposes of the Act. Thus, based upon the plaintiffs' allegations, defendants in their individual capacities are the appropriate party defendants on the state law claims.

5. Intentional Infliction of Emotional Distress

Finally, plaintiffs have sought to recover damages for intentional infliction of emotional distress. The standards by which this claim should be evaluated are well-established.

"In *Eddy v. Brown*, 715 P.2d 74 (Okla. 1986), the Oklahoma Supreme Court recognized the existence of a claim for intentional infliction of emotional distress as an independent tort. The Court stated that the tort would be governed by the narrow standards of Restatement (Second) of Torts §46 (1977), which provide in part,

> (1) One who by extreme or outrageous conduct intentionally or recklessly caused severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. . . . [Such liability does not extend] to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities.

Eddy directed that under Oklahoma law the trial court is given the initial responsibility:

> to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the . . . standards [of a cause of action for intentional infliction of emotional distress]. Only when it is found that reasonable men would differ in an assessment of this critical issue may the tort-of-outrage claim be submitted to the jury.

715 P.2d at 76-77.

> We have held that to establish a prima facie case of intentional infliction of emotional distress, a plaintiff must demonstrate:
>
> (1) that the tortfeasor acted intentionally or recklessly; (2) that the tortfeasor's conduct was extreme and outrageous; (3) that the plaintiff actually experienced emotional

> distress; and (4) that the emotional distress was severe. *See Pytlik v. Professional Resources Ltd.*, 887 F.2d 1371, 1379 (10th Cir. 1989) (applying Oklahoma law).
>
> *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1387 (10th Cir. 1991)."

Katzer v. Baldor Elec. Co., 969 F.2d 935, 939 (10th Cir. 1992).

As stated, the Court must determine in the first instance whether the defendants' conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. The absence of extreme and outrageous behavior is fatal to plaintiffs' right to proceed. In examining the conduct of the defendants', the Court is mindful that it is not enough that they acted with tortious intent, that they intended to inflict some emotional distress or that they know that some distress was certain, or substantially certain, to result from their conduct. Restatement (Second) of Torts §46, comment d. Liability may be "found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and . . . be regarded as atrocious, and utterly intolerable in a civilized community." *Id.; See Eddy*, 715 P.2d at 77.

The plaintiffs' allegations, if taken as true, demonstrate conduct on the part of the defendants that is sufficiently extreme and outrageous to meet the narrow requirements of section 46 and to submit to the ultimate factfinder for consideration. Accordingly, defendants are likewise not entitled to summary judgment on plaintiffs' claim of intentional infliction of emotional distress.

CONCLUSION

Based on the foregoing, the Court finds the defendants' Motion for Summary Judgment [Docket # 35] should be and is hereby **DENIED.**

ENTERED this 13th day of March, 1995.

/s/ Vicki Miles-LaGrange
VICKI MILES-LAGRANGE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SUZANNE MYERS, et al., Plaintiffs,	)	Case No. CIV-94-246-M
vs.	)	
COUNTY OF OKLAHOMA COUNTY, et al.,	)	
Defendants.	)	

ORDER

(Filed Mar. 13, 1995)

This matter comes before the Court on the Motion for Summary Judgment filed by defendants Board of County Commissioners of Oklahoma County ("County") and J.D. Sharp ("Sharp"), in his official capacity as Sheriff of Oklahoma County, December 1, 1994, pursuant to Fed. R. Civ. P. 56. Plaintiffs responded in opposition December 16, 1994. Based upon the parties' submissions and the following undisputed facts, the Court makes its determination.

1. On April 4, 1993, plaintiff Suzanne Myers called "9-1-1" to request assistance with her husband, the decedent Tom Myers.

2. Tom Meyers had locked himself in the family home and refused to allow Suzanne Myers to enter the home.

3. Suzanne Myers believed her husband to be intoxicated and depressed.

4. Shortly after noon on April 4, 1993, the Bethany Police Department responded to the scene and sometime between 12:30 p.m. and 1:30 p.m. members of the Oklahoma County Sheriff's Department arrived on the scene and took control of the situation.

5. Gene McPherson, a supervisor and Lieutenant with the Oklahoma County Sheriff's Department, conversed with Tom Myers through an opening in the sliding glass door.

6. Tom Myers had a loaded gun.

7. Tom Myers told Gene McPherson he had been drinking and was intoxicated.

8. While Tom Meyers and Gene McPherson were conversing, Tom Meyers fired a shot.

9. Lt. Neal Troutman, trained negotiator with the Oklahoma County Sheriff's Department, took control of the situation.

10. Lt. Troutman did not speak directly with Gene McPherson nor receive any information directly from him.

11. Lt. Troutman spoke to Tom Myers by telephone several times during the day.

12. Tom Myers told Lt. Troutman that he was "tired of living" and wanted "to die".

13. Tom Myers did not exit the apartment at any time.

14. Suzanne Myers completed a voluntary statement which was taken to Judge Charles Kelley, a Special District Judge of the Oklahoma County District Court.

15. Judge Kelley issued an Order of Detention and Forcible Entry.

16. On the afternoon of April 4, 1993, Sheriff J.D. Sharp arrived on the scene.

17. On the afternoon of April 4, 1993, Sergeants Scott Cannon and Marshall McDonald entered the home of Tom Meyers.

18. Sergeants Cannon and McDonald fired nine shots at Tom Meyers.

19. Tom Meyers died as a result of the gunshot wounds he received.

Plaintiffs have alleged in their complaint that defendants deprived them of various constitutional rights in violation of title 42, section 1983 of the United States Code. Plaintiffs have also alleged defendants are liable under state law.

DISCUSSION

1. Fourth Amendment Claims

Defendants argue they are entitled to summary judgment on the grounds that no Oklahoma County Sheriff's Department employee or Board employee violated plaintiffs' decedent's Fourth Amendment rights. Plaintiffs have alleged defendants are liable for the use of excessive force by its officers.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court made clear that local governmental entities can be held liable under section 1983 only if the deprivation of a federally-protected constitutional right is the result of action taken pursuant to official government policy or custom. The Supreme Court emphasized that these entities cannot be held liable under section 1983 under a theory of respondeat superior. *Id.* at 691 (municipality cannot be held liable solely because it employs tortfeasor). Liability arises only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edits or acts may fairly be said to represent official policy, inflicts the injury . . . . " *Id.* at 694; *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (officially sanctioned or ordered acts of officials are acts of government entity); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (governmental entity not liable under section 1983 for acts of official unless official possessed final policymaking authority to establish policy with respect to acts in question).

Furthermore, the Supreme Court in *City of Canton v. Harris*, 489 U.S. 378, held municipal liability under section 1983 attaches "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' . . . can a city be liable for such a failure under §1983." Therefore, municipal liability for failure to train must amount to "deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The Tenth Circuit likewise acknowledged that a "supervisor or the municipality may be liable in a §1983 action brought for excessive use of force by the police

'[w]here there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable.' " *Houston v. Reich*, 932 F.2d 883, 888 (10th Cir. 1991) (quoting *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988)).

Defendants have first argued that they are entitled to summary judgment on plaintiffs' claims under the Fourth Amendment to the United States Constitution because plaintiffs have failed to demonstrate that the officers inflicted constitutional harm. Defendants contend "absent a finding that the use of deadly force was not appropriate in this case, a governmental entity cannot be held liable based on the actions of one of its officers when in fact it has been determined that the officer inflicted no constitutional harm." *See* Defendants' Motion for Summary Judgment at p.12.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1986) held

> "that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest . . . or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."

Id. at 395 (emphasis deleted). The Supreme Court stated further that

> "As in other Fourth Amendment contexts, . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and

> circumstances confronting them, without regard to their underlying intent or motivation."

490 U.S. at 396-97 (citations omitted).

The Tenth Circuit has frequently noted that whether the police used excessive force in section 1983 cases is usually a question for the factfinder. *See Quezada v. County of Bernalillo,* 944 F.2d 710, 715 (10th Cir. 1991). Furthermore, plaintiffs have presented sufficient probative evidence in this case to require submission of their claim of excessive force to a jury. Therefore, defendants assertion that no unconstitutional deprivation of a federally protected right has occurred is yet to be decided.

However, in their response, plaintiffs have failed to identify any policy or custom of the County, whether made by lawmakers or by an official possession final policymaking authority, which resulted in or is affirmatively linked to the alleged violation of plaintiffs' decedent's Fourth Amendment rights. Plaintiffs have failed to provide any evidence that the County's policies or customs were the moving force behind the alleged use of excessive force. Accordingly, the County is entitled to summary judgment on the plaintiffs' Fourth Amendment claim under section 1983.

Plaintiffs also claim defendant Sharp, in his official capacity, is liable for the officers' alleged use of excessive force. "A supervisor is not liable under section 1983 unless an 'affirmative link' exists between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or direction, or his failure to supervise.' " *Meade v. Grubbs,* 841 F.2d 1512, 1527 (10th Cir. 1988) (citing *Specht v. Jenson,* 832 F.2d 1516,

1524 (10th Cir. 1987)). "Unless a supervisor has established or utilized an unconstitutional policy or custom, a plaintiff must show that the supervisory defendant breached a duty imposed by state or local law which caused the constitutional violation." *Id.* at 1528 (citations omitted). Since a sheriff is responsible for the conduct of his deputies, "a sheriff is accountable in a §1983 action whenever a sheriff, in a position of responsibility, knew or should have known of the misconduct, and yet failed to prevent future harm." *Id.* (citing *Anthony v. Baker, 767* F.2d 657, 666 (10th Cir. 1985)). Plaintiffs have failed to provide sufficient evidence that Sharp established an unconstitutional policy or breached a duty imposed by state or local law which violated plaintiff Tom Meyers' Fourth Amendment rights. Furthermore, plaintiffs have failed to present any facts showing defendant Sharp knew or should have known of any alleged misconduct of his officers. While plaintiffs contend Sharp was present at the scene and made the decision to enter Tom Meyers' apartment, plaintiffs provide no evidence that Sharp authorized any use of excessive force. Defendant Sharp likewise is entitled to summary judgment on this claim.

Finally, the Court finds plaintiffs' failure-to-train claims meritless[1]. As defendants correctly point out, the County has no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies. *See Meade,*

---

[1] Defendants have moved for summary judgment on the issue of whether the training of Oklahoma County deputies is constitutional and legal. The Court will address this issue in relation to plaintiffs' allegations in their amended complaint that defendants are liable for failing to train the officers. *See* Plaintiffs' Amended Complaint ¶¶30-31.

841 F.2d at 1528. As to defendant Sharp, plaintiffs fail to present facts sufficient to satisfy the deliberate indifference standard defined by the Supreme Court in *City of Canton v. Harris*. Plaintiffs must come forward with some evidence to show Sharp essentially failed to train his officers in the use of deadly force or that the training programs were so inadequate as to amount to no training at all. Defendants submitted extensive evidence of departmental training on mental health, deadly force, tactical team procedures and negotiation skills. Sharp is entitled to summary judgment on this claim as well.

2. State Law Claims

Defendant County argues it is immune from plaintiffs' state law claims pursuant to the Oklahoma Governmental Tort Claims Act ("Act"), Okla. Stat. tit. 51 §§ 151 *et seq*. Specifically, the County argues is it immune under §§ 155(3), 155(4), 155(5) and 155(6).

The cited portions of section 155 provide:

The State or a political subdivision shall not be liable if a loss or claim results from:

. . .

(3) Execution or enforcement of the lawful orders of any court.

(4) Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including but not limited to, any statute, charter provision, ordinance, . . .

(5) Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;

(6) Civil disobedience, riot, insurrection or rebellion or the failure to provide or the method of providing, police, law enforcement or fire protection.

* * * *

The County contends subsection (3) applies because the decision to enter Tom Meyers' apartment was done pursuant to a court order. It argues subsection (4) applies because Oklahoma County deputies were attempting to enforce state law, namely, Okla. Stat. tit. 43A § 5-207(B)[2]. It argues subsection (5) applies because any training involved in this case was discretionary by Defendant Sharp, not the County Board. The County argues subsection (6) applies because the deputies' training program was the method of providing police protection. The Court agrees. Accordingly, defendant County is immune from liability on plaintiffs' state law claims.

---

[2] Okla. Stat. tit. 43A § 5-207(B) reads:

> Any peace officer who reasonably believes that a person is a person requiring treatment, an alcohol-dependent person, or a drug-dependent person to a degree that immediate emergency action is necessary shall take said person into protective custody. The officer shall make every reasonable effort to take the person into custody in the least conspicuous manner.

3. Eighth Amendment Claim – Deliberate Indifference

Defendants correctly argue plaintiffs' claim of deliberate indifference to serious medical needs under the Eighth Amendment is erroneous because the Eighth Amendment applies to convicted persons. However, the Tenth Circuit has recognized that pretrial detainees are entitled to the same degree of medical attention as convicted inmates under the Fourteenth Amendment's Due Process Clause. *Martin v. Board of County Comm'rs of Pueblo County*, 909 F.2d 402, 406 (10th Cir. 1990). Deliberate indifference is shown by the failure to provide prompt attention to serious medical needs.

As discussed earlier in this Order, to successfully state a section 1983 claim against the County, plaintiffs must present evidence of the County's policies or customs that were the moving force behind this alleged constitutional violation. The Court finds plaintiffs have failed to submit any evidence which would allow this claim to survive summary judgment. The County is entitled to summary judgment on the plaintiffs' Eighth Amendment claim.

The same analysis the Court used for supervisory liability against defendant Sharp for the alleged Fourth Amendment violation applies to this alleged Eighth Amendment violation. Plaintiffs must identify facts sufficient to show Sharp established or utilized an unconstitutional policy or breached a duty imposed by law which caused this alleged violation of Tom Meyers' Eighth Amendment rights. Again, the Court finds plaintiffs have

failed to come forward with sufficient evidence to preclude summary judgment. Defendant Sharp is likewise entitled to summary judgment on this claim.

4. "Conspiracy to Tort"

Finally, on plaintiffs' claim for "conspiracy to tort", the Court finds such claim does not survive the defendants' request for summary judgment. In their response, the plaintiff did not oppose the defendants' arguments regarding this claim; in fact, plaintiffs' response made no reference to their claim for "conspiracy to tort".

CONCLUSION

Based on the foregoing, the Court finds the defendants' Motion for Summary Judgment [Docket #36] should be and is hereby

(1) **GRANTED** as to plaintiffs' Fourth Amendment claims under section 1983, including use of excessive force and failure-to-train;

(2) **GRANTED** as to plaintiffs' state law claims against defendant County;

(3) **GRANTED** as to plaintiffs' Eighth Amendment claim under section 1983 of deliberate indifference to serious medical needs; and

(4) **GRANTED** as to plaintiffs' claim of "conspiracy to tort".

ENTERED this 13th day of March, 1995.

/s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGEMENT
DOCKET ON 3-13-95

Supreme Court, U.S.
FILED
SEP 27 1996
OFFICE OF THE CLERK

(2)

No. 95-2091

In the

Supreme Court of the United States

October Term, 1995

J.D. SHARP, SCOTT CANNON and MARSHALL McDONALD, in their individual capacities,

Petitioners,

vs.

SUZANNE MYERS, individually and as administratrix of THOMAS MYERS, decedent, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Carl J. Franklin, OBA 013978
P.O. Box 1742
Norman, OK 73070-1742
(405) 329-1776

20 pp

TABLE OF CONTENTS

i. Table of Contents i

ii. Table of Authorities ii

I. Statement of the Case 2

II. Statement of the Issue 7

III. Grounds for Denying the Petition 9

IV. Conclusion 16

TABLE OF AUTHORITIES

Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834 (1996) 8, 9, 10, 11, 13, 15, 16

Johnson v. Jones, 515 U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) 8, 9, 10, 11, 13, 14, 15, 16

Mitchell v. Forsyth, 472 U.S. 511 (1985) 9

Pelletier v. Federal Home Loan Bank of San Francisco, No. CV 89-969 (CD Cal., Oct. 5, 1989) 11, 12

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rules of Civil Procedure, Rule 56 - Summary Judgment .. 10

No. 95-2091

In the

Supreme Court of the United States

October Term, 1995

J.D. SHARP, SCOTT CANNON and MARSHALL McDONALD, in their individual capacities,

Petitioners,

vs.

SUZANNE MYERS, individually and as administratrix of THOMAS MYERS, decedent, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully pray that this Court will deny the petition for writ of certiorari filed by petitioners. The Petitioners seek review of the "propriety of the judgment of" the Tenth Circuit, filed on May 10, 1996. The Petitioners sought appellate review of an

Order entered by the United States District Court for the Western District of Oklahoma denying qualified immunity to petitioners. The Tenth Circuit held that no jurisdiction for such appeal existed, and the petitioners appeal therefrom.

I. STATEMENT OF THE CASE

Respondents, decedent Tom Myers his wife/widow Suzanne Myers and their infant son Samson, submit the following material to correct or supplement allegations by the Petitioners.

While Tom was only three years old he witnessed the brutal shooting death of his mother by his father. He then watched as his father committed suicide. After the deaths Tom was adopted by his father's sister. To ease his pain from these events Tom had been told that he had been adopted by the Myers' while Mr. Myers was stationed with the military in Europe. For almost 30 years Tom lived with this story.

During the early days of April, 1993, Tom received information from another relative that in fact he was not adopted and that it was his natural father and mother who died in the murder/suicide. Tom, who lived 500 miles from his adoptive mother (a sister of his father), confronted her with this allegation. She promised to come to Oklahoma City to discuss the matter, and did in fact arrive on April 3, 1993.

On the night of April 3, 1993, Tom Myers and his adoptive mother discussed the murder/suicide and Tom's family history. After this conversation Tom Myers began drinking. He did not, however, drink in front of his adoptive mother. Later, after his mother had gone to bed, Tom and Suzanne Myers discussed the revelations and Tom's family history. The couple argued, and after midnight Tom demanded that his wife, infant son, and adoptive mother leave the family home. Suzanne Myers took the child and Tom's mother to her parents house a few miles away.

More than ten hours later, Suzanne Myers returned, with her father and Tom's adoptive mother, to the apartment to check on Tom. Tom Myers was still drunk and refused to allow his wife or family into the apartment. Suzanne Myers, having been through an intensive rehabilitation program with Tom, knew that she could summon the police in hopes of getting help for her depressed and intoxicated husband.

Officers from the Bethany, Oklahoma police department arrived a short time later and began talking with Tom Myers. Tom refused to allow them to enter the apartment, but did communicate with them. The police officers from Bethany did not request outside assistance.

An off duty sheriff's department detention supervisor was monitoring police calls at home and heard the call given to the Bethany police officers. Though off duty, and not requested to

assist, the supervisor came to the scene and took over talks with Tom Myers. Eventually the Oklahoma County Sheriff's Department's tactical/SWAT team was summoned. Additionally, the sheriff, defendant J.D. Sharp, arrived on the scene and took command.

The tactical team members, on authority of defendant J.D. Sharp, kicked in the door to the Myers' apartment. The plan, as testified to by other members of the tactical team, was to kick open the door and look inside without entering the apartment. Instead, petitioners Cannon and McDonald immediately rushed into the apartment with their drawn weapons.

At least fifteen shots were fired by the petitioners at the supine body of Tom Myers. Tom was struck 9 times in the upper body, neck and face. At least seven of the nine shots took a path through Tom's body that in a downward trajectory. One bullet entered Tom Myers' right cheek, exited under the left jaw, and then entered the body cavity through the left shoulder. Another bullet struck Tom Myers in the right upper chest just below the collar bone and came to rest in the left back at the belt line. Other bullets traveled in similar trajectories.

After being shot nine times, Tom Myers died while still on the couch of his home.

Petitioners have incorrectly alleged that after "a standoff of several hours" decedent, Tom Myers, fired one shot "at a deputy." Petition at page 2. There has been no finding by any trier of fact that

such was the case. This allegation, along with many other factual matters, is at issue. The closest we come to a factual finding on this issue is that by the trial court which states, "Tom Meyers (sic) fired a shot." There is no finding that this shot was "at a deputy."

Additionally, the shot was not fired after "a standoff of several hours." The police had been on the scene less than one hour when the gun accidentally discharged in the apartment. According to police officers who witnessed the event, Tom Myers immediately announced that the shot had been accidental and that it had struck a wall at a point farthest from any police personnel. None of the officers on the scene took any retaliatory action, and made no move to leave the positions they held prior to the accidental discharge.

Petitioners have couched their version of the facts in such a way that one could believe that the accidental firing of a shot and the attempt to take Tom Myers into "protective custody" were close in time. They were not. The accidental shot occurred before 2:30 p.m., and the attack of Tom Myers happened after 8:00 p.m. Almost six hours elapsed between the two events. It should also be noted that defendant J.D. Sharp, during depositions, admitted that Tom Myers had taken no action prior to the attack against his apartment which would warrant his arrest or the use of deadly force against him.

Petitioners allege that "as the deputies were in the process of executing the warrant, Decedent met them with a raised rifle." Id. Again, Respondent disagrees with this version of the facts. This is

another factual allegation which remains at issue. Respondents intend to show at trial, through the physical evidence, that Tom Myers was lying on the couch at the time he was shot by the petitioners.

Respondents also submit that the "warrant" in question was not in fact a warrant but was an "Order of Detention" which was to be used to take decedent into "protective custody" for substance abuse treatment. As defendant J.D. Sharp testified to during deposition, Tom Myers had taken no action which would require the issuance of a warrant for his arrest.

Likewise, the "warrant" was improperly issued since it violated both Oklahoma law and constitutional standards preventing an unreasonable seizure of the person. The facts surrounding the issuance of the "warrant" are still at issue, and Respondents submit that there are genuine issues of fact remaining.

It should also be noted that Petitioners have slipped in an irrelevant piece of information which has no bearing on this Petition. Petitioners attempt to sway this Court's opinion by alleging that both the Oklahoma County District Attorney and a shooting review board of the defendant county reviewed the matters surrounding the killing of Tom Myers. The Respondents forcefully state that such actions have no legal weight and are certainly not persuasive. Likewise, the acts of the persons charged with the duty of protecting the county's pocket book are wholly irrelevant. The only issue before this Court

is whether the Petitioners should be given a third opportunity to delay the inevitable trial in this matter.

II. STATEMENT OF THE ISSUE

THE HOLDING IN BEHRENS V. PELLETIER DOES NOT APPLY IN THIS CASE AND DOES NOT GRANT AN ABSOLUTE RIGHT OF REVIEW BEYOND THAT ALREADY EXERCISED BY THE PETITIONERS

The Respondents herein (Plaintiffs below) brought an action against the Petitioners in February 1994 for constitutional and statutory violations arising from the incidents described above. The Trial Court entered a Scheduling Order shortly thereafter. This Order set a deadline for completing discovery and filing all dispositive motions.

Both parties conducted extensive discovery. All written discovery was completed before the deadline. All depositions by Respondent had been completed, and the Petitioners had completed all but one deposition within the time allotted. By agreement of the parties, and upon joint motion, the deadline for this deposition was extended to allow Petitioners to depose the remaining witness.

No dispositive motions were filed until just before the deadline. By this time, the parties had completed discovery and survived the substantial rigors of pre-trial procedure.

In their sole motion the Petitioners sought the protections of

qualified immunity. The Trial Court carefully weighed the issues raised by the Petitioners in their motion and found that a genuine issue did exist on the issues of excessive force. The petitioners, on the day Voir Dire was to begin, gave notice of their intent to appeal, and the trial was postponed to allow Petitioners the opportunity to seek interlocutory review at the Tenth Circuit.

The petitioners submitted to the United States Court of Appeals for the Tenth Circuit their claims that immunity was denied improperly. Respondents responded in a timely fashion. The Tenth Circuit, in applying the holding by this Court in Johnson v. Jones, 515 U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), found that they (Tenth Circuit) did not have jurisdiction to hear an appeal on the issue of qualified immunity where the pivotal issues are those based in fact rather than law.

The Petitioners now allege that this Court's decision in Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834 (1996), grants them a superior right of review above that set forth in Johnson v. Jones, 515 U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). The Respondents disagree and respectfully request that this Court deny the Petition for a Writ of Certiorari.

III. GROUNDS FOR DENYING THE WRIT

A DENIAL OF QUALIFIED IMMUNITY BASED ON ISSUES OF FACT IS NOT APPEALABLE ON AN INTERLOCUTORY BASIS AND BEHRENS V. PELLETIER DOES NOT CREATE SUCH RIGHT

The Petitioners claim that Behrens requires mandatory appellate jurisdiction where qualified immunity is the issue. The Respondents disagree and contend that Behrens does not alter Johnson but instead clarifies a procedural defect for determining what type of issues are reviewable. This change does not affect the Tenth Circuits decision and should not cause further delay in getting this case back to trial.

Prior to 1995 the courts had followed a standard of allowing interlocutory appellate review of immunity issues as set forth in Mitchell v. Forsyth, 472 U.S. 511 (1985). By allowing such review the courts protected the central theme of qualified immunity; i.e., to prevent unneeded trials and to allow government officials the freedom to act without the fear for continued judicial scrutiny or civil liability. By 1995, though, this attitude toward interlocutory appeals on immunity claims had changed.

In June of 1995 the United States Supreme Court handed down the pivotal case of Johnson v. Jones, 515 U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). This case held that only claims of

immunity based on questions of law were immediately appealable. Those matters which were entrenched in a question of fact could not be appealed as a final order. Specifically, this Court held that:

> [A] defendant, entitled to invoke a qualified immunity defense, **may not** appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.

Johnson at 2159 (emphasis added).

The holding in Johnson effectively placed a limit on the nature of an appeal at the interlocutory stage. By limiting the appeal to questions of law this Court strengthened the trial courts' ability to weigh issues of fact without the expectation of piecemeal litigation through interlocutory appeals. By limiting the appealability of these issues this Court has left in place the long standing rule that summary judgment will be denied when a "genuine issue" as to the facts exists. See, Rule 56 of the Federal Rules of Civil Procedure.

In the present case the finding by the trial court that issues of fact remain demand that summary judgment be denied. Likewise, an appeal can not be taken where the issues surround questions of fact and not those focused on law. Since the Order in question determined only whether a factual issue existed the petitioners have no right of immediate appeal.

In applying Johnson the Tenth Circuit properly applied the

new standard for interlocutory appeals of qualified immunity claims. Though the petitioners did argue, during oral argument, that Behrens applied, the Tenth Circuit correctly followed Johnson.

When one examines Behrens it is clear that it does not change Johnson's position on what type of matters are appealable. Even under Behrens a government defendant can not appeal a denial of qualified immunity when the issue is one of fact rather than law. What Behrens does provide, though, is the ability to appeal each of several separate claims of immunity apart from the others.

In Behrens a government employee and defendant sought the protections of qualified immunity at the earliest stages of trial by filing a Motion for Dismissal. This was denied and defendant appealed. Pelletier v. Federal Home Loan Bank of San Francisco, No. CV 89-969 (CD Cal., Oct. 5, 1989).

At a later stage of the case the defendant attempted his immunity defense through summary judgment, and was again denied. He attempted a second appeal. This time, though, it was based on the summary judgment denial rather than the denial of the Motion to Dismiss. Pelletier v. Federal Home Loan Bank of San Francisco, No. CV 89-969 (CD Cal., Oct. 5, 1989).

The Court of Appeals for the Ninth Circuit entertained the appeal not withstanding its interlocutory nature. The Court rejected

the defendant's claim on it merits, though, and *in dictum* held:

> [T]hat a defendant claiming qualified immunity could not take advantage of the several opportunities for immediate appeal afforded him by bringing repeated pretrial appeals, and that one such interlocutory appeal is all that a government official is entitled to and all that the Circuit Court would entertain.

Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865, 870 (9th Circuit 1992).

The matter was sent back to the trial court where discovery was conducted. Following discovery defendant moved for summary judgment on qualified immunity grounds. Defendant contended that his actions had not violated any "clearly established" right of Plaintiff. The trial court denied the motion and held that "material issues of fact remain." Pelletier v. Federal Home Loan Bank of San Francisco, No. CV 89-0969 (CD Cal., Sept. 6, 1994).

Defendant filed a notice of appeal. The trial court, on Plaintiff's motion, certified the appeal as frivolous. In an unpublished order, the Ninth Circuit dismissed the appeal for lack of jurisdiction. Pelletier v. Federal Home Loan Bank of San Francisco, No. 94-56507 (9th Circuit, Nov. 17, 1994); Certiorari granted 514 U.S. ____ (1995).

The Ninth Circuit, in applying their "one appeal" rule, refused to hear the appeal on the denial of immunity through summary judgment. The defendant sought a Writ of Certiorari, and

this Court pronounced the ability of a government defendant to appeal each claim of immunity separately when the claims arise under differing conditions.

This Court was careful to note that a claim of immunity may arise at an early stage of a trial through a Motion to Dismiss and then again after discovery is underway through a Motion for Summary Judgment. As this Court noted it is likely that a Motion to Dismiss filed early in a case will be based on questions of law while a later Motion for Summary Judgment will be based on facts uncovered during discovery. As such, two standards might apply in measuring the question of immunity and thus present two distinct issues for appeal.

In short, Behrens does not grant a never ending right of appeal to a government defendant. It does grant such defendant a right to appeal separate issues of immunity. However, for the defendant to have such right of appeal he/she must still fall within the standards set forth in Johnson.

In the present case the Petitioners sole claim for immunity was based exclusively on questions of fact raised through a single Motion for Summary Judgment. The Petitioners **did not** claim that any law was unclear or in question. The only question before the trial court was whether the petitioners used excessive force, and the

trial court found that substantial issues of fact surrounding that question existed. As such, the petitioners sought a review on that issue, and the Tenth Circuit applied the proper standard.

To overcome the standard of Johnson a petitioner must show that the law in question is unclear or not well founded in prior holdings. This was not done and Johnson precludes an interlocutory appeal of the fact based question.

In evaluating this standard one can go a step further in this case to see why Johnson must be applied. Immunity was granted to the defendant county in this action where Respondent's (Plaintiffs below) claims hinged on issues of policy and training. The Trial Court sustained a bid for immunity by the county on these issues. The Respondents are prepared to show that the petitioners policies on use of force were out of date and did not comply with then current standards. But, an appeal on these issues can not be taken until after a "final judgment" is entered.

Prior to Johnson a government defendant had a virtually unlimited right of interlocutory appeal so long as part of the claim was based on a denial of immunity. Even where the denial was based on a finding by the trial court that facts remain at issue the government defendant had a right of appeal. Plaintiffs, on the other hand, did not have the luxury of such right.

In the present case this meant that the Petitioners could

appeal a denial of immunity based on questions of fact but similar questions of fact raised by Respondents could not be appealed. With the decision in Johnson, though, the playing field has been tilted a bit back toward level; even though the government defendant still retains a right of appeal that a citizen plaintiff would not have.

The Petitioners now urge this Court to delay trial again by requiring appellate review based on the holding in Behrens. Specifically, the petitioners claim that Behrens allows a "second" appeal on issues of immunity. The petitioners go so far as to suggest that Behrens grants a mandatory right of appeal which clearly contradicts the holding in Johnson. See, Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, at page 6-7.

The Petitioners interpretation of Behrens is simply wrong. It is clear that Behrens grants no more right than that already allowed under Johnson. In fact, Behrens does nothing more than correct a faulty appellate rule which would preclude a defendant from raising (and appealing) the immunity defense at more than one stage of a case.

The petitioners in the present action refuse to accept that Johnson limits their ability to appeal the trial court's order denying summary judgment. Though their claim is based wholly on issues of

fact, Petitioners contend that Johnson does not apply and that the Tenth Circuit is wrong in not reviewing the decision of the trial court. Petitioners incorrectly rely on Behrens to support their argument.

When one reads Behrens it is clear that Johnson does apply. Justice Scalia, writing for the majority, states it best when he wrote:

> Johnson held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly separable from the Respondents claim, and hence there is no final decision under Cohen and Mitchell.

Behrens at 840-42, citing Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541 (1949) and Mitchell v. Forsyth, 472 U.S. 511 (1985)(emphasis added).

In the present case the entire thrust of petitioners original motion was to attack the sufficiency of the facts. The trial court found that factual evidence did exist which could support a finding that particular conduct occurred.

IV. CONCLUSION

Frankly stated the petitioners have missed the boat in their interpretation of Behrens and how it applies to this case. As such, they must be denied the relief sought and this case must proceed to trial at the earliest possible date. The petitioners rights of appeal

have been protected and it is time to protect the rights of Tom Myers, Suzanne Myers, and Samson Myers to have a jury determine whether these Petitioners used excessive force.

Respondents respectfully pray that this Court will deny the Petition for a Writ of Certiorari, and enter an Order sending this matter immediately back to the trial court for a trial on the merits.

Respectfully Submitted:

Carl J. Franklin, OBA 013978
Attorney for Respondents
P.O. Box 1742
Norman, OK 73070-1742
(405) 329-1776

(3)

Supreme Court, U.S.
FILED
OCT 4 1996
CLERK

No. 95-2091

In The

Supreme Court of the United States

October Term, 1995

J.D. SHARP, SCOTT CANNON and MARSHALL MCDONALD, in their individual capacities,

Petitioners,

vs.

SUZANNE MYERS, individually and as administratrix of Thomas Myers, decedent, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

PATRICK J. MORGAN, OBA #6400
First Assistant District Attorney
JOHN M. JACOBSEN, OBA #11879
Counsel of Record
Assistant District Attorney
Attorneys for Petitioners
505 County Office Building
Oklahoma City, Oklahoma 73102
(405) 278-1600

October 4, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents contend the holding in *Behrens vs. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) does not create a right to appeal a denial of summary judgment on individual qualified immunity grounds when issues of fact exist. However, in a most recent analysis of *Behrens* and *Johnson vs. Jones*, ___ U.S.___, 115 S.Ct. 2151 (1995), the second circuit held *Behrens* "laid to rest any possibility that a district court's mere assertion that disputed factual issues existed was enough to preclude an immediate appeal." *Salim vs. Proulx*, 93 F.3d 86 (2nd Cir. 1996).

In *Salim*, the facts reveal that Officer Proulx, a plain clothed police officer, was attempting to locate and apprehend a juvenile, Eric Reyes, who had escaped from a detention center and avoided capture. Officer Proulx was armed only with a .22 handgun. During his search, Officer Proulx spotted Reyes standing near his home. When detected, Reyes ran away and Officer Proulx gave chase. During the chase Reyes threw a rock at the officer which bounced off Proulx's arm and ricocheted off his forehead. Officer Proulx believed Reyes was armed with a knife and fired one shot to force Reyes to retreat.

Eventually, Officer Proulx caught Reyes and both fell to the ground struggling. Officer Proulx had placed his gun back in his pocket and was able to pin Reyes to the ground. At this time, 5 or 6 other juveniles came to the aid of Reyes and began to hit and kick Proulx in order to free Reyes. Somehow Officer Proulx's gun was taken out of his pocket and Reyes was fatally shot. Stipulated facts

detailed that when Officer Proulx saw the barrel of his gun in Reyes' hand, he instinctively grabbed the handle and pulled the trigger. *Salim*, 93 F.3d at 88.

In deciding the case, the district court directed the United States Magistrate to make initial findings and recommendations. The magistrate recommended denying Proulx's motion for summary judgment on qualified immunity by stating genuine issues of material fact existed on whether "a reasonable officer could have believed that the use of deadly force against Eric comported with constitutional requirements." The district court adopted the recommendation of the magistrate and denied Proulx's motion for summary judgment on qualified immunity grounds. *Salim*, at 88.

On appeal Proulx argued and the Second Circuit agreed, that "several fact-related rulings remain appealable" in connection with a district court's denial of summary judgment on individual qualified immunity grounds. In *Salim*, the Second Circuit held "*Behrens* goes further and permits an appeal where a defendant contends that the immunity defense is established on those facts, alleged by the Plaintiff, that the district court ruled were sufficiently supported to create jury issues." *Salim* at 89.

As stated in *Salim*,

> Thus, as long as the defendant can support an immunity defense on stipulated facts, facts accepted for purposes of the appeal, *or the plaintiff's version of the facts that the district judge deemed available for jury resolution, an interlocutory appeal is available to assert that an immunity defense is established as a matter of law.* Usually,

the fact-related issue that will be raised on an interlocutory appeal is whether it was reasonable for the defendant to believe that his action did not violate clearly established law. *See, e.g., Anderson,* 483 U.S. at 641, 107 S.Ct. at 3039-40; *Robinson v. Via,* 821 F.2d 913, 921 (2d Cir.1987). *In addition, Johnson, permits an appeal even on the fact-related issue of whether the defendant acted in the manner alleged by the plaintiff.* Some might have thought that a defendant's claim that he "didn't do it" relates to the merits of the plaintiff's claim, not to the defendant's qualified immunity defense to that claim. However, the Supreme Court made clear in *Johnson* that it regards a defendant's denial that he took the action alleged by the defendant to be within the scope of an immunity defense. *Johnson* itself involved precisely that type of dispute; the Court described that case as "the simple 'we didn't do it' case." *Johnson,* ___ U.S. at ___, 115 S.Ct. at 2158. Yet the Court used a case involving that type of dispute to articulate the ground rules for an appeal of a ruling rejecting an immunity defense.

Evidently, the Supreme Court regards a defendant's claim that he "didn't do it" as within the scope of the qualified immunity defense on the theory that a defendant who did not take the action alleged by the plaintiff did not violate any clearly established law prohibiting such action. In most cases where the defendant contends that he did not violate any clearly established law prohibiting such action. In most cases where the defendant contends that he did not violate clearly established law, the disputed issue is whether the pertinent law was clearly established. But *Johnson* informs us that the

> issue may also be whether the defendant took the alleged action at all.
>
> * * *
>
> An appeal is available, however, to challenge the trial judge's rejection of the immunity defense where the defendant contends that on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find, the immunity defense is established as a matter of law because those facts show either that he "didn't do it" *or that it was objectively reasonable for him to believe that his action did not violate clearly established law.*

Salim, 93 F.3d at 90-91. (emphasis added.) (footnote omitted).

It is interesting to note that in *Salim*, footnote 4, Judge Breyer considered as relevant whether the defendant committed the act alleged by the plaintiff as being determinative of a defendant's qualified immunity defense. (See, *Salim*, 93 F.3d 90, footnote 4).

In the instant case, the district court found petitioners' McDonald and Cannon's actions "were reasonable and justified under the facts and circumstances confronting the officers at the time." (App. 28). This finding was made by the district court after considering Respondents' motion for summary judgment. Also, the District Court found nineteen material issues of uncontested facts (App. 11-13; 24-26) and found that under undisputed fact number 15, that Judge Kelley had issued an Order of Detention and Forcible Entry. Thus, deputies McDonald and Cannon entered the decedent's home

under authority of a warrant and justifiably relied on a neutral unbiased judge making a determination of probable cause to attempt to take Tom Myers into protective custody. Thus, even considering facts favorable to respondents, the district court concluded the actions of McDonald and Cannon were "reasonable and justified" (App. 28). Under such facts, *Salim* dictates an appeal is available under the reasoning of both *Johnson* and *Behrens*.

CONCLUSION

The holding of the Second Circuit in the case of *Salim vs. Proulx*, 93 F.3d 86 (2nd Cir. 1996) appears to be in conflict with the Tenth Circuit's holding in the present case. Contrary to Respondents' assertions, *Johnson* does permit "an appeal even on the fact-related issue of whether the defendant acted in the manner alleged by the plaintiff." (*Salim*, 93 F.3d at 90)

Petitioners ask this Court to grant Petitioner's Writ for Certiorari in order to remove the conflict of the Tenth Circuit's ruling in the present case with the Second Circuit's ruling in *Salim vs. Proulx*, 93 F.3d 90 (2d Cir. 1996). Petitioners assert *Johnson*, when analyzed by this Court's subsequent decision in *Behrens*, allows appellate jurisdiction of the denial of an individual's qualified immunity defense.

Respectfully submitted,

PATRICK J. MORGAN, OBA #6400
JOHN M. JACOBSEN, OBA #11879
Assistant District Attorneys
505 County Office Building
Oklahoma City, Oklahoma 73102
(405) 278-1600